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No. 319

In the Supreme Court of the United States

OCTOBER TERM, 1932

UNITED STATES, PETITIONER

v.

ACME OPERATING CORPORATION; LIBERTY TRUST COMPANY, INTERVENOR

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Claims (R. 51) is reported in 74 C. Cls. 82.

JURISDICTION

The judgment of the Court of Claims was entered February 8, 1932. (R. 66.) Motions for new trial were overruled on June 15, 1932. (R. 67.) The petition for certiorari was filed August 24, 1932, and granted October 17, 1932. (R. 69.) The

jurisdiction of the Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Court of Claims had jurisdiction to enter its judgment in this case.

2. Whether the Court of Claims has jurisdiction of a claim by a mortgagee not entitled to possession for alleged injuries by the United States to ships which it had requisitioned from the mortgagors.

3. Whether recovery may be had through the Court of Claims upon a claim for alleged injuries to property when there are no allegations of fact in the petition upon which to base such a claim.

4. Whether a mortgagee may recover against a third party for alleged injuries to the mortgaged property which are not shown to have been wrongfully inflicted.

5. Whether a mortgagee may recover for alleged injuries to the mortgaged property which do not impair its security.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra,* pp. 43–45.

STATEMENT

This action was begun as a suit by the Acme Operating Corporation for just compensation alleged to be due it as charterer of two vessels, the use of

which was requisitioned by the Government. The Liberty Trust Company intervened in the action. The facts relevant to the issues here presented may be summarized as follows:

The two ships in question, the *J. S. Whitney* and the *H. M. Whitney,* were owned, respectively, by the Acme Steamship Corporation, and the Whitney Steamship Corporation, of New York. The *J. S. Whitney* was subject to a mortgage of $150,000, and the *H. M. Whitney* was subject to a mortgage of $200,000. Those mortgages were held by the Fidelity Trust Company, of Boston, Massachusetts (predecessor in interest of the intervenor).[1] (Findings 2, 6, 13; R. 30, 31, 33.) The Acme Operating Corporation (the plaintiff in the Court of Claims), a corporation organized under the laws of New York, chartered the ships from the owners on January 7, 1918. (Findings 12, 13; R. 32–33.) About the same time the two vessels were placed in the yards of construction companies for enlargement and repair. Work was completed on April 10, 1918, in the case of the *H. M. Whitney,* and shortly after April 27, 1918, in the case of the *J. S. Whitney.* Part of the cost of this work was paid, leaving a balance of $132,509.45 due on the *J. S.*

[1] Since the claim of the respondent Liberty Trust Company is derived from the mortgages to the Fidelity Trust Company, the respondent is referred to in this brief as the mortgagee.

Whitney and of $253,640.63 on the *H. M. Whitney*. (Findings 8, 9; R. 31–32.)

On April 27, 1918, the Shipping Board requisitioned the two ships. (Findings 1, 16, 18, 19; R. 29, 37, 38.) At about the same time both ships were arrested by United States marshals under libels filed by the construction companies to recover the balances due them, and were subsequently released to the Government by orders of court. (Findings 18, 19; R. 37–38.)

On August 12, 1918, the United States (through the Shipping Board) and the owners of the ships (Acme and Whitney Steamship Corporations) executed a contract with respect to the ships, to which the Fidelity Trust Company was a party. This contract is annexed to the intervening petition (R. 24–28) and by reference is made a part of Finding 22. (R. 39–41.) It provided that expenditures by the Government in behalf of the owners, for shipment of the cargoes which were in the ships at the time of requisition, should be repaid to the Government out of the sums due the owners as just compensation for the use of the ships. If the just compensation exceeded the debt to the Government, the excess was to be applied to the payment of the mortgages and liens on the ships; but if the just compensation was less than the sum due the Government, it was to have a lien on the ships, to the extent of the difference, superior to the mortgage liens of the Fidelity Trust Company.

On December 4, 1918, requisition charter parties between the Government and the owners of the ships were executed on the standard form as of the dates of the requisitions. The charter parties provided that the owners accepted them in full satisfaction of any claims they might have against the Government arising from the requisitions. (Finding 22; R. 41.) The *H. M. Whitney* remained in the Government service until December 26, 1918, and the *J. S. Whitney* until May 22, 1919, on which respective dates the ships were placed in New York Harbor, where they remained until returned to their owners. (Finding 21; R. 39.)

On June 30, 1919, the owners of the ships agreed to deliver them to a representative of the Fidelity Trust Company to be operated for the latter's benefit. They then notified the Government of their readiness to accept the return of the ships. As they were in need of repairs, it was agreed between the Government and the owners that the vessels should be surveyed for the purpose of ascertaining the cost of placing them in satisfactory condition. The vessels were delivered to the owners on July 8, 1919, and July 10, 1919. (Finding 28; R. 46.) At that time the value of the ships in good repair was $482,000 for the *J. S. Whitney* and $436,000 for the *H. M. Whitney*. (Finding 32; R. 49.) The survey took place in the last week of July, 1919, and the cost of reconditioning the vessels was fixed at $87,706.84, which sum the Govern-

ment credited to the owners of the ships. (Finding 28; R. 46–47.)

In order to prevent the sale of the vessels, in the admiralty proceedings the Fidelity Trust Company on August 5, 1919, entered into agreements for the purchase of the libellants' claims and later received an assignment of all of one claim and of the greater part of the other. (Finding 29, R. 47.)

The ships had been placed in dry dock for repairs and reconditioning by their owners shortly after the Government returned them in July, 1919. After the completion of this work on August 29 and September 30, 1919, respectively, they were removed by the Fidelity Trust Company's representative. The Trust Company paid $55,377.26 "for sundry services and materials" in connection with the *J. S. Whitney* and $81,087.50 "for sundry services and materials" in connection with the *H. M. Whitney*. These sums were charged to the owners of the ships. Of the money so spent there was "nothing in the evidence to show that" two items, totaling $7,165, were "in the nature of repairs." (Finding 24, R. 43–44.)

In September, 1920, the Fidelity Trust Company became financially embarrassed and was taken over by the Massachusetts commissioner of banks; and in April, 1921, its assets were transferred to the present intervenor. (Finding 29; R. 47–48.)

A final accounting between the owners of the ships and the Government (not completed until 1926), which included the credit to the owners, of

the sum of $87,706.84 which had been fixed by the board of survey as the cost of reconditioning the ships, showed a balance still owing to the Government of $77,068.54. This accounting was correct. (Finding 33; R. 50–51.)

The claim of the plaintiff as charterer of the vessels was disposed of by the court on the grounds, among others, that at the time the ships were requisitioned the plaintiff neither had nor was entitled to their possession, and that the plaintiff and the owners of the ships, all of which were controlled by the same persons, were *alter egos*, so that payment of just compensation to the owners was payment to the plaintiff. With this branch of the case we are no longer concerned.

The intervenor also sought recovery as assignee of the mortgages and construction liens. It alleged that its predecessor had been prevented from foreclosing the mortgages as a result of the requisition, and that since the ships had no market value at the time they were released from requisition, the security for the mortgages had been rendered worthless. Its petition concluded with a prayer for "such further and other relief" as it might be entitled to.

The Court gave judgment in favor of the intervenor for $129,299.76, with interest at 6 per cent from October 1, 1919, to February 8, 1932. The judgment represents the sum spent by the Fidelity Trust Co. for "direct repairs" in reconditioning the ships after their return by the Government.

The principle upon which the Government's liability for this amount is predicated is not easily discernible in the opinion of the court. The court stated that the case necessitated "the determination of a new principle for which [it found] no direct precedents in the authorities." (R. 62.) It said that since the intervenor's predecessor was not entitled to possession of the ships at any time between the dates of requisition and release from Government service it could not recover compensation for the taking and therefore had no claim for the depreciation in market value. But the court said that the Government was liable to some one for the repairs made to the vessels, and that the Government's credit to the shipowners of the cost of reconditioning the ships did not protect it as against the intervenor's predecessor. Analogy was made to the case of a mortgagee not in or entitled to possession, who may recover against a third person for injuries to his interest in the mortgaged property. Although recognizing that this rule applies only where the third person acts wrongfully, and that the action of the Government in taking possession of the ships in this case was not wrongful, the court said that the same principle applied. It hurdled the difficulty that such a claim had not been pleaded by saying that the matter had been argued by the parties without objection and that the broad prayer for relief was sufficient to include this claim, and concluded by allowing recovery of repairs necessary to restore the vessels to their con-

dition when requisitioned by the Government, although a substantial portion of the "repairs" was not found to be necessary for this purpose and was merely assumed to be so in the opinion.

SPECIFICATION OF ERRORS

The Court of Claims erred:

1. In taking jurisdiction of a claim for damages sounding in tort.

2. In permitting the intervenor to recover without showing that the alleged injuries to the mortgaged property were wrongfully inflicted.

3. In granting a judgment which was not supported by the findings of the court since they do not disclose the character, purpose, or necessity of the expenditures for which recovery was had, or that these expenditures were made necessary by any act of the Government.

4. In taking jurisdiction of a claim which was not pleaded.

5. In giving judgment for the intervenor.

SUMMARY OF ARGUMENT

I

The Court of Claims did not have jurisdiction to enter judgment in this case. The injury on which the judgment was based did not result from a seizure of the ships under the authority of the Act of June 15, 1917 (*infra*, pp. 44–45), but was a consequence of the use of the ships by the United States.

That use was not pursuant to the requisition but under the terms of a charter entered into between the United States and the owners of the vessels.

The Court of Claims expressly held that the Government "took nothing" from the mortgagee by the requisition (R. 63), since the mortgagee was neither in possession of the ships nor entitled to have possession at the time of the requisition or at any time while the Government retained them. Since the Government "took nothing" from the mortgagee by the requisition, it follows that the mortgagee's injuries, if any, do not fall within the terms of the Act of June 15, 1917, allowing just compensation for a taking.

The Court of Claims did not have jurisdiction to enter its judgment in this case under its general jurisdictional statute. The mortgagee's claim does not fall within Section 145 of the Judicial Code (*infra,* p. 43) because (1) any action under that section is barred by the statute of limitations, and (2) if there is an action it sounds in tort and is, therefore, outside the jurisdiction conferred on the Court of Claims.

Even though the Court of Claims might otherwise have had jurisdiction in this case, it was without jurisdiction because of the provisions of Section 2 of the Suits in Admiralty Act. This action was originally begun in the Court of Claims by the Acme Operating Company as plaintiff against the United States. The Acme Operating Company's asserted cause of action arose upon a

charter party which it had entered into with the Government. Consequently the suit was in admiralty, and jurisdiction over it lay exclusively in the district courts of the United States. *Matson Navigation Co.* v. *United States,* 284 U. S. 352. The mortgagee's petition of intervention stands upon the original suit of the Acme Operating Company, over which there was no jurisdiction.

II

The judgment of the Court of Claims is not supported by its findings. The court's judgment was based on the facts stated in the sixth paragraph of Finding 24. (R. 43–44.) But with respect to a substantial portion of the expenditures included in this finding, it was not found that they were for repairs which were necessary to restore the vessels to their condition when they were requisitioned by the Government. This finding presented "no direct evidence" of the amount of repairs necessary. (R. 43.) There are other findings (Findings 28, 33; R. 46, 51) which are inconsistent with it.

If the mortgagee was entitled to recover at all, the burden lay on it to show what part of the expenditures were occasioned by repairs for which the Government was responsible. The findings of the Court of Claims fail to show this essential fact, and they accordingly form no basis for the court's judgment.

III

The mortgagee is not entitled to recover on a ground not pleaded in the Court of Claims. The mortgagee's petition below stated no facts and made no claim with respect to the injury to the mortgaged property for which judgment was given. The Court of Claims recognized this defect but gave judgment under the general prayer for relief in the intervenor's petition.

Liberality in pleading may not extend so far as to relieve a suitor of the necessity of setting out the facts upon which he seeks to recover. This Court has frequently stated that a judgment of the Court of Claims must be based on facts *pleaded* and proved. Even if there was enough in the petition to warrant timely amendment it would have been necessary in order to support the judgment to have alleged a cause of action long since barred by the statute of limitations. Under these circumstances the rules of pleading may not be dispensed with.

IV

If the merits of the mortgagee's claim are open for consideration, there can be no recovery. A mortgagee not entitled to possession may not recover for injuries to the mortgaged property unless damage is wrongfully inflicted and in such case may not recover more than the amount by which his security is impaired. The judgment of the court below is not based on injury to the mort-

gagee's reversion; it is for the full amount of the expenditures made by the mortgagee, which the court says were for repairs. We submit that a judgment for the full amount of the repairs in the absence of a finding that the mortgagee's security was impaired, is plainly erroneous.

Furthermore the Government's obligation to return the vessels in good repair arose under its charter and was owed primarily to the mortgagor and the satisfaction of that obligation is a bar to any action by the mortgagee. The findings show conclusively that the Government's obligation to the mortgagors was discharged in full.

Even if settlement with the mortgagor would not under all circumstances bar the mortgagee, the mortgagee is barred in this case because the payment was made to the mortgagor pursuant to the express agreement of the mortgagee that it should be so paid. The mortgagee can not assert this claim as one for just compensation and at the same time disregard the provisions of the contract which it entered into on August 12, 1918, by which it agreed that all payments on account of just compensation should be made to the mortgagors, at least to the extent of the mortgagors' indebtedness to the Government.

V

The intervenor was not entitled to recover as owner of the maritime liens. The Government took nothing with respect to these claims when it requi-

sitioned the ships. The decrees which were entered by the admiralty courts fully protected the owners of these claims. The intervenor could have enforced the claims directly against the vessels, and since it chose not to take such action, there is plainly no basis for liability against the United States.

ARGUMENT

I

THE COURT OF CLAIMS WAS WITHOUT JURISDICTION TO ENTER ITS JUDGMENT IN THIS CASE

A. The Act of June 15, 1917, did not confer jurisdiction since the injury on which the judgment was based was not caused by a seizure of the ships

The statute upon which the mortgagee apparently relies as a basis for its recovery is the Act of June 15, 1917 (*infra*, pp. 44–45). This statute authorized the President to take over the title to or the possession of any ship and provided that in such case the United States should "make just compensation therefor." This compensation was to be determined by the President or his delegate; but if the amount so determined was unsatisfactory, the claimant was entitled to be paid 75% of the award and to sue in the Court of Claims for such further amount as was necessary to make just compensation.

This statute authorized a suit in the Court of Claims for just compensation for the seizure of

any ship under its provisions. But the injury on which the judgment below was based did not result from a seizure of the ships under the authority of the Act of June 15, 1917. There was no interference with the mortgagee's title or possession, as the Government did not take title, and the mortgagee was not entitled to possession. The injury, if any, was a consequence of the use of the ships by the United States, and that use was not pursuant to the requisition, but under the terms of a charter entered into between the United States and the owners of the vessels.

On April 26, 1918, the Shipping Board adopted a resolution requisitioning the *J. S. Whitney* and the *H. M. Whitney*. (R. 37.) Had this order been carried through to its conclusions, injuries to the vessels while under requisition no doubt would have been compensable under the Act of June 15, 1917. But the ships were operated under "requisition charter parties" which were entered into between the Shipping Board and the owners of the vessels on December 4, 1918, but dated as of April 27, 1918, and April 28, 1918. (R. 41.) Recovery has been had for reconditioning the vessels upon termination of these charters. Undoubtedly, the owners of the vessels had authority to charter the vessels without consulting the mortgagee. The Court of Claims expressly recognized this in its opinion. (R. 64.) The obligation to recondition the ships upon termination of the charters arose

under the charters, and damages to the ships while under charter was not recoverable under the statute as just compensation. Cf. *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 358.

It may be argued that the mortgagor had no authority to release liabilities which had already accrued in favor of the mortgagee, and that any injuries which occurred prior to December 4, 1918, the date of the requisition charters (R. 41), may be compensated for as the consequences of the requisition. But both vessels were operated under the requisition charters, the *James S. Whitney* until May 22, 1919, and the *H. M. Whitney* until December 26, 1918. (Finding 21; R. 39.) The two vessels were not returned to their owners until July 8 and 10, 1919. (Finding 28; R. 46.) There is nothing in the findings to show that either vessel was damaged before December 4, 1918, and the record is wholly consistent with the probability that the injuries occurred after December 4, 1918, while the vessels were operated under the charters. The mortgagee has, therefore, failed to sustain the burden, which was on it, to show that the injuries were the consequence of the requisition.

The Court of Claims expressly held that the Government "took nothing" from the mortgagee by the requisition (R. 63), since the mortgagee was neither in possession of the ships nor entitled to have possession of the ships at the time of the

requisition. Continuing, the Court of Claims said (R. 63):

> We think, therefore, it can not be said that the Government by taking possession of the ships and holding them for a limited time deprived the Trust Company of anything, and, consequently, the intervenor has derived from the Trust Company no right to receive compensation for this action.

Since the Government "took nothing" from the mortgagee by the requisition, it follows that the mortgagee's injuries, if any, do not fall within the terms of the Act of June 15, 1917, allowing just compensation for the taking.

The present case, we believe, is plainly distinguishable from *Duckett & Co.* v. *United States*, 266 U. S. 149, upon which the respondent relies. (Br. in Opp. 5.) In that case a lessee of piers and warehouse property who was in possession of the property, was held entitled to just compensation when the property was requisitioned. The lessee's estate under his lease was taken by the requisition, and he was held entitled to compensation for the value of his estate. But here the possessory interest alone was taken. The mortgagee was not entitled to possession and the Court of Claims has expressly held that the Government "took nothing" by the requisition. In taking over the use of the ships the Government did not appropriate the mortgage or any rights thereunder.

B. Judgment could not be given under the general jurisdiction of the Court of Claims

Section 145 of the Judicial Code (*infra*, p. 43) provides for the general jurisdiction of the Court of Claims. But the mortgagee's claim in this case does not fall within that section, because (1) any action under Section 145 of the Judicial Code is barred by the statute of limitations, and (2) if there is an action it sounds in tort and is, therefore, outside the jurisdiction conferred on the Court of Claims.

1. Section 156 of the Judicial Code (*infra*, p. 43) provides that every claim against the United States "shall be forever barred" unless the petition is filed in the Court of Claims "within six years after the claim first accrues." In this case the claim of the mortgagee accrued not later than July 8 and July 10, 1919, when the two ships were released from the custody of the Government and returned to their owners. (Finding 28; R. 46.) The mortgagee's motion to intervene was filed on December 17, 1925 (R. 15), and its petition as intervenor was not filed until February 4, 1927 (R. 16). It is thus obvious that the intervenor's petition was not filed until more than six years after the cause of action, if any, accrued, and that the Court of Claims was, therefore, without jurisdiction to enter a judgment under its general jurisdictional statute. The fact that the intervenor's claim was not rejected by the Shipping Board until some time after Febru-

ary, 1921 (Finding 33; R. 50), is immaterial, so far as the court's jurisdiction under Section 145 is concerned, for presentation of the claims to the Shipping Board was in no sense a prerequisite to an action under Section 145.

2. Furthermore, Section 145 of the Judicial Code does not confer jurisdiction because the claim upon which recovery has been had is one sounding in tort. At common law the mortgagee's cause of action for injury to the mortgaged property was trespass or trespass on the case. Jones, *Chattel Mortgages* (5th ed.), Sec. 449. The Court of Claims in its opinion repeatedly refers to the mortgagee's claim as based on "injury" to the vessels. (R. 63, 64, 65.) That the mortgagee's action is for a tort is also made plain from the argument of the question on the merits presented in Point IV of this brief below.

C. The Court of Claims had no jurisdiction over the mortgagee's petition because of the provisions of the Suits in Admiralty Act

This action was originally started in the Court of Claims by the Acme Operating Company as plaintiff against the United States. The Acme Operating Company, through an affiliated corporation, had entered into a charter party with the United States. (R. 41.) By this charter it accepted the compensation there provided and the other obligations assumed by the United States "in full satisfaction of any and all claims he has or may

have against the United States arising out of the requisition." Since the Acme Operating Company had entered into this charter, its cause of action was one in admiralty, and under Section 2 of the Suits in Admiralty Act, jurisdiction over it lay exclusively in the district courts of the United States. *Matson Navigation Co.* v. *United States,* 284 U. S. 352.

The mortgagee's petition of intervention in the Court of Claims stands no better than that of the Acme Operating Company, over which there was no jurisdiction. Except for a claim for the principal amount of the mortgages, which was denied by the court below, the mortgagee sought no independent relief in the Court of Claims. The specific prayer of the mortgagee's petition was:

> That of any judgment awarded herein against the United States there be awarded to your petitioner, Liberty Trust Company, the sum of [$1,023,042.63] * * *

Jurisdiction over the intervenor's petition must be determined by the allegations and prayer of that petition itself. It is plain that the mortgagee sought only to share in any recovery which might be allowed the Acme Operating Company. Since the Court of Claims was without jurisdiction to consider the Acme Operating Company's petition, when that petition fell, we submit, the mortgagee's petition fell with it. Cf. *Rouse* v. *Letcher,* 156 U. S. 47; *Adler* v. *Seaman,* 266 Fed. 828, 832 (C. C. A 8th).

The basis of the Court of Claims's judgment in favor of the mortgagee, it is true, is independent of any recovery by the Acme Operating Company. But no facts supporting this claim were alleged in the petition, nor did the petition contain any prayer for a judgment on that ground. This defect in the mortgagee's petition is discussed more at length in Point III below. The defect is material here, because in the absence of any allegations or prayer stating a cause of action independent of the petition of the Acme Operating Company, there was no basis for jurisdiction over the mortgagee's petition.

II

THE JUDGMENT OF THE COURT OF CLAIMS IS NOT SUPPORTED BY ITS FINDINGS

The only findings of the Court of Claims which relate to the injuries for which it allowed the mortgagee to recover are contained in the sixth paragraph of Finding 24. (R. 43–44.) These findings should be read in connection with the comments in the court's opinion (R. 66) upon the nature of the expenditures. We believe these findings are not sufficient to support the judgment, even if the court's conclusion on the substantive question be correct, since, with respect to a substantial portion of the expenditures, it is not found that they were for repairs which were necessary to restore the vessels to their condition when they were requisitioned by the Government.

The obligation, if any, for which recovery has been allowed, was to restore the ships to the condition in which they were when they were requisitioned, and the court below states that judgment has been given because of this obligation. (R. 64.) But there is nothing in Finding 24 (R. 43–44) to indicate what amount of the mortgagee's expenditures was on account of repairs occasioned by ordinary wear and tear incident to service, what amount may have been made necessary through extraordinary use of the vessels by the Government, or what amount was for replacements and renewals for which the Government was in no way responsible. The court below stated in its opinion (R. 65) that—

> There is no direct evidence that the amount which the intervenor seeks to recover was actually necessary to put the vessels in as good repair and condition as they were when the Government took them over, * * *.

But the burden was on the mortgagee to prove by direct evidence that the sums were so spent, and it has failed to sustain this burden. The assumption by the court that the sums expended were for repairs made necessary by the Government's use is not justified by Finding 24, which merely states that the expenditures were for various services and materials "nearly all of which are expenses for direct repairs." (R. 43.)

The findings of the Court of Claims are not conclusive when it appears on the face of the record that they are erroneous. *Collier* v. *United States,*

173 U. S. 79, 80–81; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, 232. We submit that that is the situation here. The Court of Claims has entered judgment for the cost of making certain repairs when it says itself (R. 65) that "there is no direct evidence" that the amount stated in its Finding 24 "was actually necessary to put the vessels in as good repair and condition as they were when the Government took them over." But the findings do contain direct evidence on this question. In Finding 28 (R. 46) it appears that the ships were surveyed by a board of survey shortly after they were returned to the owners, and that this board found that the cost of executing the necessary repairs was $72,500, plus fourteen days' charter hire, making a total of $87,706.84. This certainly was direct evidence of the cost of executing the repairs. Furthermore, this sum for repairs is included in the account set out in Finding 33 (R. 51), which the court expressly states "is found to be correct." (R. 51.) The credit in this account was in accord with the agreement between the Government and the owners to which the mortgagee was a party. (R. 39–40.)

Nor was there any basis for the court's conclusion as to how much of the expenditures included in its Finding 24 were occasioned by repairs. The only evidence before the court was a stipulation entered into between all the parties, the mortgagor, the mortgagee, and the Government. No testimony of

any sort was presented to the court. We are, of course, aware of the rule that this Court will not review evidence to determine the correctness of findings made by the Court of Claims, but nevertheless we submit that the Court of Claims is not free to make findings contrary to the terms of a stipulation, when that stipulation is the only evidence before the court.[2] Cf. *Iowa Bridge Co.* v. *Commissioner,* 39 F. (2d) 777, 780 (C. C. A. 8th).

Based on this stipulation, the parties all concurred in presenting requested findings of fact to the Court of Claims. The portion of these requested findings which relates to the injuries to the vessels involved in this case is set forth as Appendix B of this brief (*infra,* pp. 46–49). In this requested finding no distinction whatever was made between "repairs" and "renewals." Of the total sum of $136,464.76 involved in this item, $107,486.36 represents items described only as "sundry repairs and renewals." Of course, the Government was not liable for renewals to the vessels. The Government's liability was at most limited to the expense of restoring the ships to the condition they were in at the time of the requisition, and did not include liability for the complete renovation of

[2] This Court has recently stated the rule to be applied to findings of the Court of Claims as follows: "The findings of fact of the Court of Claims are to be treated like the verdict of a jury." *United States* v. *Wells,* 283 U. S. 102, 120. The verdict of a jury can not stand when there is no evidence to support it or when it is contrary to stipulated facts and there is no other evidence on the question.

ships which were more than eighteen years old when the Government took them over.

The burden of proving the facts necessary to show the Government's liability was on the mortgagee. In this case, if the mortgagee was to recover at all, the burden lay on it to show what part of the expenditures were occasioned by repairs for which the Government was responsible. The findings of the Court of Claims wholly fail to show what portion of the expenditures made by the mortgagee were necessary to restore the vessels to their condition when they were requisitioned by the Government. The finding accordingly forms no basis for the judgment of the Court of Claims.

III

THE MORTGAGEE IS NOT ENTITLED TO RECOVER ON A GROUND NOT PLEADED IN THE COURT OF CLAIMS

The judgment of the Court of Claims in this case was based on certain injuries to the mortgaged property which occurred while the ships were being operated for the United States. The mortgagee's petition in the Court of Claims stated no facts and made no claim with respect to any such injury to the mortgaged property. The Court of Claims specifically recognized this failure of the mortgagee to plead the facts upon which the judgment was based, saying (R. 65) that

> a claim for damages on account of the condition in which the ships were returned is not

specifically pleaded in the intervenor's petition.

But the Court of Claims said that the intervenor's petition contained "a broad and sweeping prayer for general relief,"[3] and held that this was sufficient under the liberal rules of pleading prevailing in the Court of Claims.[4]

It is true that the Court of Claims is not bound by special rules of pleading, and there is liberality as to the form in which facts may be pleaded. *Wisconsin Central Railroad Co.* v. *United States,* 164 U. S. 190, 212. But this liberality, of course, does not extend so far that a petitioner in the Court of Claims may wholly fail to set forth the facts upon which he seeks to recover. The requirement that

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[3] This general prayer reads as follows (R. 24):

"And that your petitioner may have such further and other relief to which it may appear your petitioner is entitled."

[4] The Court of Claims also stated that the matter was argued both by the intervenor and counsel for the Government without any objection being made to the pleadings. So far as any waiver is concerned it should be noted that the case was not argued before the Court of Claims, but was submitted. (R. 29.) In the Government's main brief in that court, there was no mention of the question; the only question raised by the intervenor which was then discussed was the right to recover the face amount of the mortgages. The question of the right of the intervenor to recover for repairs was mentioned in a reply brief for the Government to the extent of two pages (pp. 272–274), in which no cases were cited. In no sense could the material presented be deemed a waiver of the mortgagee's failure to allege any facts whatever on the question.

the petition must contain a plain statement of the facts upon which recovery is sought is expressly included in the rules of the Court of Claims. (Rule 7.) The same requirement is made by Section 156 of the Judicial Code (*infra*, p. 43), which bars any claim "unless the petition *setting forth a statement* thereof" is filed within six years. (Italics ours.) In the present case, no facts relating to the question upon which the judgment was based were pleaded.[5] Liberality in pleading should not be carried to the extent that this fundamental requirement is completely disregarded. This Court has frequently stated that a judgment of the Court of Claims must be based on the facts *pleaded* and proved. *Baird* v. *United States*, 131 U. S. cvi, cvii–cviii, affirming, 8 C. Cls. 13, 16; *Clark* v. *United States*, 95 U. S. 539, 543; *Merritt* v. *United States*, 267 U. S. 338, 341.

It is true that a judgment may be one which is not sought by the petition, but in such a case the facts upon which the judgment is based must be pleaded. A judgment may not be based upon grounds presented only in argument. *Clark* v. *United States*, 95 U. S. 539, 543, *supra*; *Electric Boat Co.* v. *United States*, 66 C. Cls. 333, 377;

[5] The intervenor's claims against the Government are set forth in paragraphs XVIII and XVIII–A of its petition. (R. 22.) The claim set out in paragraph XVIII for the amount of the mortgage notes was denied by the court below. (R. 62, 63.) The claim set out in paragraph XVIII–A for depreciation in the value of the ships was likewise denied. (R. 63, 64.) No facts to support any other claim were pleaded.

Brown v. *United States,* 1 C. Cls. 377. The judgment in the present case so far departs from the issues presented by the pleadings as to deprive the Government of notice of what the claimant intended to prove and an opportunity to present its own case. See *Merritt* v. *United States,* 267 U. S. 338, 341, *supra; Burt* v. *United States,* 19 C. Cls. 120, 122.

It is plain, we believe, that the Government was taken by surprise when the Court of Claims based its judgment on facts which were not pleaded by the mortgagee, and for which no relief was sought in the mortgagee's prayers. Had the facts in question been pleaded, it is, of course, impossible to tell what evidence the Government might have been able to present to combat them. If there had been any express agreements with the mortgagee on the subject, these agreements would have been produced and put in evidence; and there obviously may have been many other facts which might have borne on the question of the Government's liability. But the facts were not pleaded; the Government had no reason to present evidence to meet them.

That the Government was taken by surprise is shown plainly enough from the findings of the Court of Claims. The only finding upon which the amount of the judgment was based is the sixth paragraph of Finding 24. (R. 43–44.) This finding was based on a stipulation; no other evidence was introduced. (See Point II, pp. 21–25, *supra.*)

There is nothing in the finding made by the court to show what portion of the expenses incurred were necessary to restore the vessels to their condition when requisitioned by the Government. In presenting the facts to the court, no distinction was made between "renewals" and "repairs," and no effort was made to segregate injuries to the vessels occurring before December 4, 1918, the date the requisition charters were executed, and those incurred after that date. It is, of course, obvious, that if the issue had been before the Court of Claims on the pleadings, the Government would have presented the evidence so as to make these important distinctions.

Moreover, even if the facts had been fully presented to the Court of Claims, the mortgagee's position could have been protected only by allowing it to file an amended petition. But an amended petition stating these facts would clearly have raised a new cause of action, not pleaded in any way in the mortgagee's original petition. Such a new cause of action was long since barred by the statute of limitations at the time the judgment of the Court of Claims was entered, and, therefore, under Section 156 of the Judicial Code (*infra*, p. 43), the Court of Claims would have been without jurisdiction to enter a judgment on these facts even if they had been properly pleaded in an amended petition.

IV

THE MORTGAGEE WAS NOT ENTITLED TO RECOVER ON THE MERITS UNDER THE CIRCUMSTANCES OF THIS CASE

A. A mortgagee not entitled to possession may not recover for injuries to the mortgaged property unless damage is wrongfully inflicted and in such case may not recover more than the amount by which his security is impaired

Although a mortgagee who is not in possession nor entitled to possession [6] may under some circumstances have an action against a third party for injuries to the mortgaged property, we know of no case where such an action has been maintained unless the injuries were wrongfully inflicted. A mortgagee of chattels has been allowed to recover for wrongful destruction or disposition of the mortgaged property, which the third party was not privileged to make or the mortgagor to allow. But the cases allowing such recovery make it plain that they are applicable only where the injuries were wrongful. Thus in *Adams & Frederick Co.* v. *South Omaha National Bank,* 123 Fed. 641, 645 (C. C. A. 8th), one of the cases relied on by the court below (R. 65), the rule is stated as follows:

> When a third party *wrongfully* takes mortgaged property and so deals with it as to

[6] In considering the present question, cases such as *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, where the mortgagee was in or entitled to possession must be distinguished.

> destroy the value of the mortgagee's lien, the injury which he sustains is not dependent to any extent upon the inquiry whether he was or was not in possession of the property or entitled to its possession at the time the *wrong* was done. (Italics ours.)

See *Storms* v. *Smith,* 137 Mass. 201; *Allen* v. *Wright,* 134 Mass. 347; *Manning* v. *Monaghan,* 23 N. Y. 539. When the taking is lawful, the mortgagee has no action except on a complaint properly showing an injury to his reversionary interest. *Goulet* v. *Asseler,* 22 N. Y. 225.

In the case of real estate the rule is the same and the mortgagee may recover against a third party for a severance only if the severance was wrongful. *McGahan* v. *Bank of Rondout,* 156 U. S. 218, 235; *Searle* v. *Sawyer,* 127 Mass. 491, 493. See also *O'Brien* v. *Miller,* 117 Fed. 1000 (C. C. D. Conn.), cited by the court below (R. 65); *Morgan* v. *Gilbert,* 2 Fed. 835 (C. C. W. D. Mich.); Jones, *Mortgages* (8th ed.), Secs. 851, 859.

It must be conceded that the requisition and use by the Government in this case were lawful. In the course of time ordinary wear and tear would require the reconditioning of the ship, but this was a mere incident of their lawful use. The court below conceded in its opinion (R. 64) that the mortgagors had authority to charter or lease the ships without the consent of the mortgagees. This of course was a correct statement of the law. *Keith* v.

Burrows, 2 App. Cas. 636; Jones, *Chattel Mortgages* (5th ed.), Sec. 548; Williams and Bruce, *Admiralty Jurisdiction and Practice* (3d ed.), p. 38.[7] It can not be the law that the charterer of a ship from a mortgagor who had authority to enter into the charter becomes liable to a mortgagee for injuries which are not shown to have been other than those normally incident to the ordinary use and operation of the ship.

Cases such as the present one, where the use of the ships alone was taken, must be distinguished from cases where the mortgaged property is destroyed or disposed of so that the mortgagee is wholly deprived of his interest. A case of the latter sort is *Chicago* v. *Tebbetts,* 104 U. S. 120, cited by the respondent (Br. in Opp. 7), where the mortgagee was held entitled to share in the payment made when land was condemned for a public improvement. These cases rest on the ground that the act of the third person in destroying the

[7] As corollaries of this rule it is held that when a mortgagor of a ship charters it, a mortgagee not in possession is not entitled to the freight. *The Brig Wexford,* 7 Fed. 674 (S. D. N. Y.); *Gardner* v. *Cazenove,* 1 H. & N. 423. Likewise, a mortgagee of land is not entitled to the rent when not in possession. *Freedman's Saving Co.* v. *Shepherd,* 127 U. S. 494; *In re W. R. Kuhn Co.,* 225 Fed. 13, 17, 18 (C. C. A. 3d).

mortgaged property has deprived the mortgagee of his security.

But in no case is the mortgagee entitled to recover more than the amount by which his security has been impaired. *Morgan* v. *Gilbert,* 2 Fed. 835 (C. C. W. D. Mich.), *supra; Elvins* v. *Delaware & A. T. & T. Co.,* 63 N. J. L. 243; *Goulet* v. *Asseler,* 22 N. Y. 225, *supra; Planter's Bank* v. *Lummus Cotton Gin Co.,* 132 S. C. 16; *Atkinson* v. *Hewett,* 63 Wis. 396. It is only to that extent that he has been injured; he can not recover more than the amount of his injury.[8]

The judgment of the court below is not based on injury to the mortgagee's reversion. The judgment is for the full amount of the expenditures made by the mortgagee, which the court says were for repairs. These expenditures were not necessary to protect the mortgagee's reversion unless without them the ships were not worth the amount of the mortgagee's liens. But the court has made no findings as to the extent of any injury to the mortgagee's reversion, and it has not founded its

[8] It is sometimes stated that the law of Massachusetts is an exception to this uniform rule. Sedgwick, *Damages* (9th ed.), Sec. 73; Sutherland, *Damages* (4th ed.), Sec. 1034. But there is nothing to indicate that this exceptional rule is applied to personal property even in Massachusetts.

In any event, as is pointed out below (*infra,* pp. 34–35), the Massachusetts rule is not applicable in this case.

judgment on that basis. A judgment for the full amount of the repairs in the absence of such a finding is plainly erroneous.[9]

The mortgagee places great reliance on its statement (Br. in Opp. 8) that "The mortgages were Massachusetts mortgages, executed and delivered in the Commonwealth (Findings 2, 6; Record pp. 30, 31, 62)," and seeks to bring itself within the broad rule stated in *Delano* v. *Smith,* 206 Mass. 365. But even if a State rule of damages would be binding in a Federal court, the fact that the mortgages were executed in Massachusetts would not make their effect turn on Massachusetts law. The effect of the mortgages would be governed by the law of the place where the ships were when the mortgages were executed (*Green* v. *Van Buskirk,* 7 Wall. 139; American Law Institute, *Restatement of Conflict of Laws,* Sec. 286.) There is nothing in the findings to show that the ships were in Massachusetts when the mortgages were executed, or that the ships

[9] The mortgagee seems to argue (Br. in Opp. 8) that its security was impaired. But there is no finding to this effect, and other findings tend to establish the contrary. See Finding 32 (R. 49), showing the ships were worth $918,000 in good condition when they were returned, which was somewhat more than the amount of the liens then outstanding (about $750,000; Finding 29, R. 47), plus the cost of the repairs ($129,299.76; R. 66). The mortgagee refers to interest (Br. in Opp. 8), but there is no finding as to interest. The conclusive answer to the mortgagee's argument that its security was impaired is that the Court of Claims' judgment did not rest on that ground.

were registered in Massachusetts or otherwise subject to its laws. Moreover, even if it were material, there is nothing in the findings cited by the respondent, or elsewhere, to show that the mortgages were even executed in Massachusetts. The findings state that the mortgages were executed to secure notes payable to a Massachusetts trust company; they do not state where the mortgages were executed. (Findings, 2, 6; R. 30, 31.)[10]

B. Even if the mortgagee might have had an action in the absence of payment to the mortgagor, no action lies in this case because the mortgagor has received full payment for the repairs

The law is, of course, clear that a mortgagor in possession may recover in full for any injury to the mortgaged property. *Arnd* v. *Amling,* 53 Md. 192; *Vandiver* v. *O'Gorman,* 57 Minn. 64; *Craig* v. *Kansas City Terminal R. Co.,* 271 Mo. 516; *Watkins* v. *Kaolin Mfg. Co.,* 131 N. C. 536; *Van Dyke* v. *Grand Trunk R. Co.,* 84 Vt. 212; Sedgwick, *Damages* (9th Ed.) Sec. 497e. The necessary consequence of this rule is that such a recovery by the mortgagor is a bar to a subsequent recovery by the mortgagee. *Field* v. *Early,* 167 Mass. 449; *Green* v. *Clarke,* 12 N. Y. 343; Jones, *Chattel Mortgages* (5th ed.), Sec. 447a. Otherwise, a third party

[10] Another reason why *Delano* v. *Smith*, *supra*, is inapplicable is that here the mortgagor has received payment in full for the injuries, and this is a bar to any action by the mortgagee. *Field* v. *Early*, 167 Mass. 449. This question is discussed more fully in Point IV (B), below.

would be liable twice for the same injury. *Luse* v. *Jones,* 39 N. J. L. 707, 712–713. The rule is no different when the mortgaged property is a ship. Thus, the payment of freight to a mortgagor before the mortgagee has taken possession of the ship is a bar to any action by the mortgagee. *Gardner* v. *Cazenove,* 1 H. & N. 423.

The obligation of the Government to return the ships in good repair either arose out of the Government's contract with the mortgagors, or was a consequence of the use of the ships which was a matter solely within the domain of the mortgagors so long as the mortgagees asserted no right to possession. As has been pointed out above (*supra,* pp. 31–32) the mortgagors had power to enter into the charters without the consent of the mortgagee, and this power must have included authority to place in the charters the usual and normal provisions regarding the obligation to return the ships in good repair. Furthermore, the cases make it plain that the matter of repairs is one that concerns the party in possession alone, and that a third party may deal with a mortgagor in possession without risk.[11] For all of these reasons it seems to us plain that the Government's obligation in the matter of repairs

[11] The power of the mortgagor over the subject of repairs is so fully recognized that it has been held that a mortgagee who later became entitled to possession could not charge the mortgagor with the cost of repairs, when the mortgagor had previously agreed with a lessee that the lessee would make the repairs. *Eggensperger* v. *Lanpher,* 92 Minn. 503.

was owed primarily to the mortgagor, and that the satisfaction of this obligation to the mortgagor is a bar to any action by the mortgagee.[12]

The findings in this case show conclusively that the Government's obligation to the mortgagors was discharged in full. From Finding 28 (R. 45–47) it appears that when the vessels were returned by the Shipping Board to the mortgagors "it was agreed between the board and the two steamship corporations that instead of the board having the repairs made on its own account the vessels would be delivered at once, surveyed by a board of survey" for the purpose of ascertaining the extent of the repairs necessary and determining the cost of such repairs, and that the cost so determined would be accepted by the parties "as final and determinative with respect to all obligations of the board in relation to repairs on the vessels." (R. 46.) It is a fair inference from this finding that this agreement and the steps taken pursuant to it were made with the full knowledge and consent of the mortgagee.

In less than three weeks after the ships were returned to the mortgagors they were surveyed pursuant to this agreement by a board of survey. The

[12] The mortgagee refers (Br. in opp. 7) to the statement of the court below that counsel for the Government in the Court of Claims did not dispute the statement "that the defendant was liable to some one for any damage done to the vessels themselves." (R. 64.) But because the Government was liable to some one for the damage, it does not follow that it must now pay the mortgagee for repairs, when it has already paid the mortgagor in full.

board found that the fair and reasonable cost of repairing the *James S. Whitney* was $35,000 and that the fair and reasonable cost of repairing the *H. M. Whitney* was $37,500; in each case the amount so found was to be increased by fourteen days' charter hire to allow for the time required to execute the work. (R. 46.)

Pursuant to its contract with the mortgagors and this finding by the board of survey, the Shipping Board credited the mortgagors with the amounts found due. (R. 46–47.) This payment was no less a payment because it took the form of a credit. The Government's rights can not be barred because it happened that at the time the mortgagor's indebtedness to the Government was greater than the Government's liability to the mortgagors. The credit was, in substance, payment, intended and accepted by the parties as such. This payment to the mortgagors in possession of the ships on account of repairs is a full and complete defense to the United States for any further action on account of repairs either by the mortgagors or mortgagee.

C. Furthermore the mortgagee is barred in this case because the payment was made to the mortgagor pursuant to the express agreement of the mortgagee

If settlement with a mortgagor in possession discharging an obligation to repair did not, as we contend it did, bar recovery by the mortgagee, the mortgagee in this case would nevertheless be barred

because it had agreed that payments for necessary repairs should be made to the mortgagor. On August 12, 1918, the mortgagor, the Government, *and* the mortgagee, entered into a contract. The Government agreed to forward the cargo on board the ships when they were requisitioned, for which the mortgagor had already received freights. The mortgagors agreed to pay the sum of $187,000 as part payment of the Government's forwarding expense and it was further agreed (R. 25) that the balance of this expense, together with interest, should be repaid to the Government by the Government's (R. 25)—

> retaining and crediting against said indebtedness any and all sums that shall hereafter become due the parties of the second part [the mortgagors], or any of them, by the party of the first part [the United States], as just compensation for the requisition of said steamers, or either of them.

(Finding 22; R. 39–40; incorporating by reference the contract which appears at R. 24–28.) The contract further provided that the Government should have liens superior to those of the mortgagees, if the ships were returned before the Government was fully reimbursed. (R. 26.) As has been pointed out, the mortgagee (the Fidelity Trust Company) was a party to this contract.

The credit allowed to the mortgagors on account of the repairs was made pursuant to this contract, as the indebtedness then due to the Government was

greater than the sum of $87,706.84 found by the board of survey to be due for repairs. Even after this credit, an indebtedness of $77,068.54 remained due the Government (Finding 33; R. 49–51), for which under the agreement of August 12, 1918, the lien of the Government was superior to those of the mortgagees.

The indebtedness of the Government on account of its obligation to make repairs was a sum "that shall hereafter become due the parties of the second part [the mortgagors]" within the provisions of the contract, because, as has been pointed out before in this brief, the obligation to make repairs is one which is owed primarily to the mortgagor in possession. The mortgagee may not assert its claim as one for just compensation and thus disregard the obligations of its contract by which it was agreed that all payments on account of just compensation should be made to the mortgagors, in reduction of the mortgagors' indebtedness to the Government which was to be preferred over its claims as mortgagee. By crediting the cost of the repairs to the mortgagor, the Government reduced the indebtedness due from the mortgagors and thus correspondingly reduced the extent of its superior lien. Thus, under the terms of the contract the credit to the mortgagors was a direct benefit to the mortgagee and improved the lien of the mortgagee by eliminating to that extent the Government's superior lien which the mortgagee had granted by the contract.

Since the credit to the mortgagors was allowed pursuant to an express contract, to which the mortgagee was a party, and since this credit operated to reduce liens superior to the liens held by the mortgagee, it must follow that the mortgagee in this case is not entitled to any further recovery from the Government.

V

THE INTERVENOR WAS NOT ENTITLED TO RECOVER AS OWNER OF THE MARITIME LIENS

Shortly after the vessels were returned by the Shipping Board to the owners, the Fidelity Trust Co., predecessor of the intervenor, purchased the claims which were held against the vessels by various construction companies. The court below did not grant judgment on the basis of these claims. We contend that the intervenor's position in the Court of Claims was not aided by its ownership of the construction claims.

The right to enforce these claims against the vessels was obviously a right in admiralty over which the Court of Claims had no jurisdiction. Nor did the ownership of these claims give the intervenor a right to recover under the Act of June 15, 1917 (*infra*, pp. 44–45). The Government took nothing with respect to these claims when it requisitioned the ships. The decrees which were entered by the admiralty courts fully protected the owners of the claims. (Findings 18, 19; R. 38.) When the vessels were returned to the owners, the mari-

time lienors could have enforced their claims in full. The amount of these claims was $386,150.08, plus interest (Finding 18, R. 37; Finding 29, R. 47), and the vessels when returned to the owners were worth $918,000 (Finding 32, R. 49). It was in order to prevent the enforcement of these liens that the intervenor's predecessor purchased the claims. (Finding 29, R. 47.)

The intervenor obviously is not entitled to recover as owner of these claims, since it could have enforced them directly against the vessels. Instead of taking that action, it chose to operate the vessels in an effort to realize not only the amount of the claims but profits as well. For all that appears in the record, the intervenor still holds the maritime claims, and may now enforce them against the ships. In this situation, there is plainly no basis for liability against the United States.

CONCLUSION

The decision of the Court of Claims is erroneous and should be reversed.

Respectfully submitted.

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DECEMBER, 1932.

APPENDIX A

STATUTES INVOLVED

Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250) provides in part as follows:

> SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *.

Section 156 of the Judicial Code (U. S. C., Title 28, Sec. 262), provides as follows:

> SEC. 156. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided,* That the claims of married women,

first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

The Act of June 15, 1917, c. 29, 40 Stat. 182, provides in part as follows:

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

* * * * *

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

* * * * *

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provision hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be

entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

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APPENDIX B

In the Court of Claims of the United States

No. E–260

ACME OPERATING COMPANY

v.

THE UNITED STATES

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCURRENCE THEREIN BY PLAINTIFF AND INTERVENER

Introductory.—All of the facts incident to this cause have been stipulated by the parties. The stipulation covers one hundred and seventy-seven pages of closely typewritten matter and as many more pages of documents filed as exhibits and by reference made part of the stipulation. The recitals in the stipulation and the documents referred to are too voluminous for inclusion as a whole in the findings.

The defendant considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the special findings of fact, requests that the Court find the same as follows:

* * * * * * *

FINDING XXVI

* * * * * * *

After delivery of the S. S. *James S. Whitney,* the Fidelity Trust Company advanced and paid for the account of Acme Steamship Corporation $55,377.26, to the parties and in the amounts following:

On account of S. S. James S. Whitney

American Bureau of Shipping, for survey June 27, Sept. 22, and July 20, 1919	$157.40
Parsons & Eggert, port-risk insurance, Aug. 23 to Sept. 7, 1919	369.65
M. G. Isdale, for survey while in dry dock	700.00
Lidgerwood Mfg. Co., for steam reversing ship winch engines	3,860.00
Robins Dry Dock and Repair Company, for removing 4 old winches and installing new ones	2,000.00
For smoothing top of midship accommodation and fitting new canvas with three coats of paint; furnishing and installing canvas covers on towing machines and furnishing and installing 1½" scupper, port and starboard side of forecastle draining bilges, and overhauling 10 lights	3,540.00
For supplying and fitting one metal lifeboat on each side of vessel with necessary platforms, davit and gear complete, boats accommodating 18 persons	3,000.00
Furnishing and installing repeating telegraph from bridge to engine room	290.00
Supplying fresh water	320.00
P. S. Thorsen & Co., Inc., for repairs to pipes and boiler	1,463.57
Robins Dry Dock & Repair Company for sundry repairs and renewals	39,676.64

After delivery of the S. S. *H. M. Whitney,* the Fidelity Trust Company advanced and paid for the account of Whitney Steamship Corporation $81,087.50, to the parties and in the amounts following:

On account of S. S. H. M. Whitney

American Bureau of Shipping for survey and duplicate certificates	$234.75
M. G. Isdale for survey while in dry dock	70.00
Parsons and Eggert, for port insurance from Aug. 23, 1919, to Oct. 7, 1919	1,045.80

Leonard Miller Co., Inc., for painting	$3,221.82
W. F. Tribble, for adjusting compasses	50.00
United Marine Contracting Corporation, for cleaning bilges, loading stores, removing ashes, removing coal from hatches to bunkers, and cleaning and painting boiler, etc.	3,094.27
Marconi Wireless Telegraph Co., repairing wireless apparatus	21.14
Robins Dry Dock & Repair Co., for two lifeboats, with platforms, davits, and gear complete, repeating telegraph from bridge to engine room, steel water-closet, port and starboard sides	4,165.00
Boring out air chamber and furnishing and installing new hand valve and seat	1,375.00
Invoice of Sept. 30, 1919, for sundry repairs and renewals of cabin, saloon, galley, deck and deck equipment	25,408.39
Robins Dry Dock and Repair Company, invoice of Sept. 30, 1919, for sundry repairs and renewals	42,401.33

* * * * * * *

Subject to reservation by the plaintiff and intervener of assent to the correctness of any one or more of the several allocations as debits or credits against or in favor of the plaintiff or defendant of the amounts set out, it is agreed by the parties that the figures and specifications of items are correct as they appear in the statement of the Board.

CHARLES B. RUGG,
Assistant Attorney General.
ARTHUR COBB,
Attorney for the United States.

The plaintiff, Acme Operating Corporation, considering the facts above set forth to be proven, and deeming them material to the due presentation of this case in the special findings of fact, concurs in the request of the defendant that the facts be found as set out.

ACME OPERATING CORPORATION,
Plaintiff.
By JOHN WALSH, *Attorney.*
Of Counsel:
LOUIS B. EPPSTEIN.

The Intervener, Liberty Trust Company, considering the facts above set forth to be proven and deeming them material to the due presentation of this case in the special findings of fact, concurs in the request of the plaintiff and defendant that the facts be found as set out.

LIBERTY TRUST COMPANY,
Intervener.

By HOWE AND BRADLEY,
(formerly Howe, Hill and Bradley),
Attorneys.

Of Counsel:
PILLSBURY, DANA & YOUNG.

U. S. GOVERNMENT PRINTING OFFICE: 1933